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Supreme Court of the United States.

OCTOBER TERM, 1902

No. 574

WILLIAM K. TUPMAN,

Plaintiff in Error,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, AND OTHER R. R. COMPANIES.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

Brief in Answer to Motion for Dismissal of Writ of Error

WILLIAM A. MELOY,

Attorney for Plaintiff in Error.

Saxton Printing Co., Washington.

Supreme Court of the United States.

OCTOBER TERM, 1902.

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WILLIAM K. TUBMAN,
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vs.

THE BALTIMORE AND OHIO R. R. COMPANY, THE BALTIMORE AND POTOMAC R. R. COMPANY, THE PENNSYLVANIA R. R. COMPANY, THE CHESAPEAKE AND OHIO RY. COMPANY, ET AL.

Answering the motion herein made for dismissal of the writ of error, plaintiff in error says:

After the United States Patent Authorities were satisfied that the subject-matter of Patent No. 192,014 was a new, useful and valuable improvement in the construction of the sides of railway cars, and plaintiff had acquired title to the letters patent protecting the same, he found that he could neither sell to the railroad companies of the United States, nor effectively prosecute them for their use and infringe-

ment of his patent, nor effectively carry forward a suit against a private manufacturing company which had infringed the said patent, because a large number of railway companies, owning many thousands of miles of railway, and possessing millions upon millions of money, with all the power and influence such aggregations of wealth can exercise, had united themselves in a great trust, and conspired together to thwart and defeat all his efforts.

He took counsel with the late Judge Shellabarger and Judge Wilson, most eminent, learned and wise lawyers. They advised him that he had a good and sufficient cause of action. Thereupon they framed and filed in the Supreme Court of the District of Columbia the declaration in this case, giving it the sanction and imprimatur of their great names.

Against this the attorneys now in court, the legal agents of the railway combine, united in filing demurrers.

Unfortunately the very eminence of Tubman's counsel, the universal demand for their services, worked to his disadvantage. In their multiplied, strenuous, and absorbing engagements, they for long could not bring the issues of law made by the demurrers to a hearing, and on the other hand, it equally served the purpose of the railway trust to let the case linger on.

For years the printed Rules of Practice of the Supreme Court of the District of Columbia had declared that when, by the filing of a demurrer to a declaration, an issue of law was raised, no further step in the action could be taken until such issue had been determined, but that, on any motion-day, either party was at equal liberty to force the issue to a hearing by the court and a determination by merely giving to his opponent, and filing in court with its clerk, a notice in writing that on the day named, not less than five days distant, he would ask the court to hear and determine the issue.

This was the plain, explicit, absolute law of the court, framed and promulgated a law to itself, and to its litigants alike.

The rules of the Supreme Court of the District of Columbia in this regard are as follows:

"**Rule 21.**

"If the defendant appear, he shall demur or plead on or before the twentieth day," &c.

"**Rule 28.**

"The form of a demurrer shall be as follows," &c.

"SEC. 2. It shall not be necessary to file a joinder in demurrer, but the filing of a demurrer shall be considered as making *an issue of law*."

"**Rule 33.**

"At any time after issue joined, and at least ten days, exclusive of Sundays, before the sitting of the court, at which the cause stands for judgment or trial, either party may give notice of trial."

FORM OF NOTICE OF TRIAL.

In — (&c.)
BETWEEN — (&c.)

"Take notice that the *issue* joined in this cause will be tried at the next term of this court.

"P. Q.,
"*Attorney*, &c.

"To P. D.,
"*Attorney*," &c.

"**Rule 38.**

"Demurrers may be heard on any motion-day, after five days notice, exclusive of Sundays.

"**Rule 88.**

"*Every motion shall be made in writing, and shall,* together with the papers on which it is founded (if made upon matters not already of record), *be filed in the clerk's office*, and a copy of the motion, &c., must be served on the opposite party or his attorney, at least two clear days, Sundays excluded, except when otherwise provided by law, before the day fixed for the hearing."

So reads the law directing how to speed and terminate the cause. Such was the full, unrestrained power of these railway companies to bring to an end the delay by giving such notice of the hearing of the demurrers.

But they were content. The state of delay well satisfied them. Judge Shellabarger died. Judge Wilson was left to bear his labors alone. Broken down in health by them, he took rest by crossing the Atlantic, and left no one behind to represent—nothing but the written rules of the court to protect—the interests of Tubman, a non-resident.

Then, on a sudden, the attorneys for these railroads were inspired with an activity and energy before unknown.

In the vacation month of August, when lawyers of Washington are deemed free to go to the mountains or sea; when Tubman's attorney was, in fact, on the ocean, a clerk in the office of these railway attorneys was dispatched to the court room, where a callow judge, freshly brought in from another jurisdiction, and unfamiliar with the rules of practice, was holding a court for disposal of such matters as might be brought before him by agreement of both sides, in his presence.

This clerk—this acolyte in the temple of justice, in deacon's orders, so to speak—prepared not to minister, but rather to fetch and carry for others—in the name of his absent principals made representations which induced the judge to direct entry to be made that the action was "dismissed for want of prosecution."

The entry made thereupon by the clerk of the court (page 8 of the Record) would seem to show that it was made on an oral motion, in open court, by the attorneys of record for the defendants, alone, but the affidavit of one of these (Record, page 13), declares that it was done, not by him, but by his clerk, and this is corroborated by the affidavit of the clerk, (Record, page 14, third paragraph). In the first of these the attorney says, under oath, "this affiant instructed Mr.——,of affiant's office to call the matter to the attention of the court and to ask for the dismissal of the suit—because this affiant was then about leaving town for his summer vacation," and, in the second affidavit, the one thus instructed says, under oath, "affiant on August 6, 1901, moved the dismissal of the case for want of prosecution, stating (that is orally, of course) at the time, the position taken by counsel for plaintiff," as he understood that.

And so, without the filing of any written motion and notice with proof of service as required by the rules, advantage was taken of the inexperience of the judge, advantage of his unfamiliarity with the preestablished rules of the court, advantage of his simple reliance upon the honor and confidence in the good faith and fairness of the moving parties. Above all, unlawful and legally forbidden advantage was thus taken of the absent plaintiff and of his absent sole attorney.

A little later Judge Wilson returned and was immediately immersed in the world noted defense of Admiral Schley. A little later and he suddenly fell under his labors and died, still ignorant of the dismissal of his action. It

was only when Tubman was by this loss called personally to come here and look after his suit that he discovered what had been done four months before, at a then already adjourned term of court.

And the record shows furthermore that when this discovery was first made appeal was already impossible. The time for that had forever passed. Equally impossible was it to treat the situation as one falling within any discretionary power of the judge by whose direction the clerk had made the entry of judgment of dismissal. With the expiry of the term of the court at which the entry was made, all discretionary powers in him ended.

From that moment then, Tubman's remedy could be sought only as founded upon rights recognized as absolute legal rights,—or on nothing.

All these facts appear in the record. It was upon them that Tubman's counsel, in May following, applied to the court (Record, pages 8, 9) to vacate the order of dismissal, as unlawful, as well as improvident.

They did not railingly denounce the agents of the railroad combination and their conduct with the cry of fraud! fraud! They calmly set forth the facts, and it is those facts that accuse them. The contents of a bottle is determined by the color, taste, smell, etc., and by the effects produced therefrom. It is not the label that decides. If the contents kill, it is poison, label or no label. So, if one's acts, or course of conduct, though irrespective of the existence or evidence of actual intent to defraud, would secure an unconscionable advantage, the circumvention of the law to the prejudice of the rights or interests of another, the court must characterize it as a fraud, regardless of whether we label it, or do not.

We claim, then, that the motion submitted to the judge of the Supreme Court of the District of Columbia on June 24th, 1902 (Record, p. 15), was a motion, based on clear

averments of fraud, to have this order dismissing the action vacated, set aside, struck out and nullified, as one unlawfully taken, improvidently made, in defiance of the rules of the court, in such manner as, without fault of his own, the party was deprived of his day in court, and so, *made without jurisdiction and void.*

It was not an appeal for a new trial or for a rehearing, for there had not been any at all.

It was not an appeal on excusatory, explanatory or palliatory facts addressed to the court's conceptions of justice and mercy, and for relief from a default.

It was not an appeal to any discretionary power of the court as to set aside a regular judgment within the term of its rendition and while it is regarded *in græmio curiæ.*

On the contrary, it was a motion to vacate a judgment which had been improvidently entered unlawfully; that is, without jurisdiction; without the party having had that day in court, which was just as firmly and insurmountably given him as in case where the marshall had not, by delivery of summons, notified him to appear. It was not based on any averment of error of opinion of the judge, whether of law or of fact. It called for a determination of the party's rights on the basis of law, and its decision was a final judgment.

Our appeal, which was subsequently dismissed by the Court of Appeals without a hearing, was an appeal "from the final order passed in said action on the 24th of June, 1902, refusing to vacate the *ex parte* judgment entered therein on the 6th day of August, 1901, without jurisdiction."

But before passing to our main argument, we desire to give attention to the authorities cited and presentation made by the movers of dismissal.

I.

The claim made by the defendants in error, that there was "no showing of fraud or surprise in procuring the judgment of dismissal," and that our motion, from the denial of which we appealed, was "directed to the so-called discretionary powers of the court" seems to us beyond all explanation unaccountable.

To the contrary, the appeal should have been sustained *because our motion did show fraud, surprise, and an extra jurisdictional act* of the judge of the circuit court in entering the order of dismissal, and was therefore not directed to any so-called "discretionary powers."

We take no issue with Chief Justice Alvey in his assumption, as quoted in our opponent's brief, that "the refusal to grant a new trial is not the subject of an appeal."

And yet we maintain that whether the refusal of the trial court to vacate a judgment be "nine months after its entry" of such judgment, or "five years after", such refusal is proper and full legal cause for appeal therefrom, without intervening acquiescence, when the application to vacate is based upon fraud, surprise, or want of jurisdiction of the court, and presented by motion within a reasonable time after the first knowledge of such non-jurisdictional and irregular acts gained by fraud and in defiance of the parties supreme rights to a day in court as expressly directed in the Court's Rules of Practice and dictated by the universal principles of Natural Justice.

II.

We do not stand before this court, nor did we before the court below, upon an appeal from the judgment of dismissal in August, 1901.

The unjust arts of the defense, ignoring the rules of

practice of the court of first instance, barred us absolutely from all appeal, and we admit this incapacity. But shall they invoke Rule 10 against us and deny us all the protection afforded by the rules of practice in the Supreme Court of the District of Columbia. Rules 21, 28, 33, 38 and 88, before cited.

III.

Our appeal, that on which we rely, the only appeal which we have pressed upon the court is, "from the order passed on the 24th of June, 1902, refusiug to vacate the *ex parte*, void judgment."

Our opponents having stated the law (p. 5 of their brief) that we could not appeal after more than twenty days from the entry of the judgment of dismissal, because the time for appeal had elapsed—which we admit—proceed gravely to postulate of the very same order, that of August 6, 1901, that it was "not an appealable order, as settled by authority"—and the rest of their brief would appear to have been written in support of this, which is too sheer an absurdity for argument.

But assuming that they made unawares a mistake, in this also as in other things, because of their precipitancy and over desire to bar us from all oral arguments; and assuming that they meant to state that the order of June 24, 1902, was not an appealable one, we accept the issue, only protesting that it involves the merits of the entire case and ought not to be entertained on a mere motion to *dismiss*.

IV.

But none of the authorities cited in their brief by the defendants in error support the proposition that the order of June 24, 1902, was not appealable.

In the Babbington *vs.* Brewery Co. case, 13 Ap. D. C. 527

the record shows that an order of distribution had been entered, all parties being present represented by their counsel; subsequently, within the same term of the court, one of these very consenting counsel appealed to the court to rescind the order, but offered *no evidence in support of the motion.* Could anything be more indubitably manifest than that this was an appeal to the discretionary power of the court on a mere reconsideration of his own rationale? Of course there could be no appeal from the court's refusal. No appeal could carry up to the appellate court the rationale, or mental facts involved.

Besides, it was a motion for a *new trial* where there had been a former trial, and all the parties in fact before the court waiving the *mesne* process of written notice.

The Court of Appeals very appropriately said in that case:

> "It was certainly competent for the court to rescind the order of distribution, at any time during the term in which it was made, but it does not appear that there was anything before the court to call into exercise its *discretionary* power to revoke or rescind such order."

Surely this case has no analogy to the case at bar.

In Harmon *vs.* Lawler (32 Texas 590), the action was at the trial stage, subject to call for trial, was so *regularly* called, but plaintiff's attorney, in court, refused to proceed, whereupon the next step, in due course, was taken and he was defaulted for want of prosecution. All this was regular, in the exact line that would be required had our case now at bar been one of issue of fact instead of issue of law, and noticed for trial, and placed on the trial calendar, and in open court called *in its order* for the plaintiff to come forward and try, or be defaulted.

In Mulhall *vs.* Keenan (18 Wallace 342) there had also been a full trial before the court pursuant to written stipulation. In the course of such trial the court had in the ex-

ercise of its judgment ruled that certain evidence was admissible notwithstanding the objection of the defendant, to which ruling, however, *he took no exception.* After the judgment, defendant in support of motion for new trial, offered affidavits to the effect that he could have contradicted this evidence, but the admission of it came upon him by surprise so that he could not get the witnesses, one or two miles away, in time to put them on the stand. The motion being overruled, bills of exception were settled and writ of error taken. It was on the argument of these bills of exception that counsel for plaintiff in error laid stress on the alleged fact that the admission of this evidence, which the appellate court said was not error, had taken them by surprise, but of this the United States Supreme Court took no notice save *to* answer: "If there were surprise the only remedy for it was a motion for new trial. With this motion and its results we have nothing to do, our duty is to ascertain whether there is any error in the record. We have found none."

The Fishburn case (137 U. S. R. 60), was another case of "motion for a new trial" on refusal of which counsel had taken an exception, as they said, in pursuance of Wisconsin code practice, which, however, the Supreme Court of the United States declared was not admissible in the courts of the United States, and as therefore the record was without evidence of error, the judgment was affirmed.

And these are the precedents of supposed pith and moment, and all of them, which in the motion papers we are called to answer.

We pass then from this mere consideration of the case made by the brief submitted by the defendants in error to a fuller presentation of our own side, largely as submitted to the Court of Appeals, in regard to which, it may be not improper to say, we have no evidence to show that it was so much as read.

SUMMARY OF STATEMENT.

(1) The *ex parte* order of dismissal made on August 6, 1901, by Justice H. M. Clabaugh of the Supreme Court of the District of Columbia was *void* for want of jurisdiction and could be attacked directly or collaterally at any time during or after the term.

(2) The order on June 24, 1902, by Chief Justice Bingham of the Supreme Court of the District of Columbia overruling the motion to vacate the said *ex parte* order was final and appealable.

(3) The decision of the Court of Appeals on November 18, 1902, dismissing the appeal on motion, was erroneous, final, and reviewable on writ of error.

Therefore, the Supreme Court has jurisdiction to entertain the writ of error.

I.

THE ORDER OF DISMISSAL ON AUGUST 6, 1901, WAS WITHOUT JURISDICTION AND VOID.

The *ex parte* order of dismissal entered by Justice Clabaugh during the vacation or recess of court on August 6, 1901, was *coram non judice* and therefore *void.* The order is as follows:

> "Supreme Court of the District of Columbia,
> Tuesday, August 6, 1901.
>
> "Session resumed pursuant to adjournment, Hon. H. M. Clabaugh, Justice, presiding.
>
> * * * * *
>
> Upon motion of defendants in open court by their

> counsel Messrs. Hamilton & Colbert, to dismiss this cause for failure to prosecute, it is upon consideration thereof ordered that said cause be and it is hereby dismissed at the cost of the plaintiff."
>
> (Unsigned.)

This order was made in violation of Rule 88, Common Law Rules of the Supreme Court of the District of Columbia, to wit:

> "Rule 88. *Every* motion shall be made in writing, and shall, together with the papers on which it is founded, if made upon matters not already of record, be filed in the Clerk's office; and a copy of the motion and of the affidavits or papers on which the same is founded must be served on the opposite party, or his attorney, at least two clear days, Sundays excluded, except when otherwise provided by law, before the day fixed for the hearing."

There is not in the record any motion in writing. There was never a motion filed in the Clerk's office. No copy of any motion, or notice of time or place of hearing, or any affidavits or papers, were ever "served on the opposite party or his attorney". The plaintiff was a non-resident and received no notice, and the Hon. Jeremiah M. Wilson, his counsel, now deceased, was, at the time of dismissal, in Europe or on the high seas returning from Europe, and did not arrive in this country till on or about August 10, 1901. No notice was left at the office of Judge Wilson. (See affidavit of Charles S. Wilson, Record p. 12.)

It is not claimed, even by defendants in error, that the motion required by the Rule was ever placed in writing, or that motion in writing was ever served on plaintiff or his counsel. The absence of the motion and notice from the Record, particularly under the direction given the clerk,

top of p. 17 of Record, makes the judgment rotten at heart.*

The Rules of Court are binding upon the court and suitors. Rio Grande Company *vs.* Gildersleeve, 174 U. S. 608; Thompson *vs.* Hatch, 3 Pick, 512; D. C. *vs.* Roth, 18 App. D. C. 547.

Rules framed by a Court in the exercise of the power vested in it as the repository of that element of governmental sovereignty known as the judicial, have the force and effect of *rules of law.* Rout *vs.* Ninde, 111 Ind., 597, and authorizes cited. Moulder *vs.* Kempff, 115 Ind., 459.

"The impression seems to prevail to some extent that the rules of practice prescribed by the Court are merely directory—that they may be ignored, disregarded and superseded almost, as of course. This is a mistake." (Supreme Court of N. C., in Walker *vs.* Scott, 132 N. C., 490.)

Rules prescribed by virtue of an act of Congress *have the force of law.* Hanson *vs.* McCue, 43 Cal., 178; Seymour *vs.* Phillips, 7th Biss., 418. *Ex rel* Koechlin, 2 Mack 15; Phoenix Mutual Life Ins. Co. *vs.* Grant, 4 Wash. Law Rep. No. 42.

Rules of practice for transacting the business of the courts are law to the courts. Golden *vs.* Prince, 3 Wash., 313.

HOWEVER, on motion to vacate the *ex parte* order,

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*There is no written stipulation in the the record signed by counsel agreeing that the cause might be dismissed.

> "Stipulations are recognized in the rules of this Court with the single provision that *they shall be in writing*," said the Supreme Court of the District of Columbia unanimously in deciding the appeal in Strong *vs.* District of Columbia, reported in 3 MacA., p. 500.
>
> There is no retraxit in the record.

heard June 24, 1902, by Chief Justice Bingham of the Supreme Court of the District of Columbia, John J. Hamilton, Esq., "employed by the firm of Hamilton & Colbert," and George E. Hamilton, Esq., filed two false affidavits, the only ones presented, for the purpose of curing the defects of the record, and showing that there was notice to plaintiff's counsel.

The statement in the affidavit of John J. Hamilton, to wit:

> "This affiant denies that said suit was dismissed without notice to the attorneys for the plaintiff, but on the contrary he avers as heretofore set forth that the attorneys for plaintiff were fully advised of the action which defendants proposed to take in the matter." (Rec., p. 15),

has no evidential value, as it was based solely on information from George E. Hamilton. It is manifest the affiant swore to what he did not know to be true, but only volunteered to repeat under oath what another had told him—proof at best of mere credulity or interest. And so we are not surprised when he further swore to *what, had he taken thought, he would have known was not true*, to wit:

> "that when the *Chief Justice* returned from Europe, the case was called to the attention of the court by this affiant on August 6, 1901, as shown by the record and affiant moved the dismissal of the case for want of prosecution, which motion was granted, affiant stating at the time, the position taken by counsel for plaintiff in the matter." Rec., p. 14.

The record shows that the case was dismissed by "Hon. H. M. Clabaugh," and not by the "Chief Justice."

> "Where a witness falsifies a fact in respect to which he cannot be presumed liable to mistake,

courts are bound upon principles of law, morality and justice to apply the maxim *falsus in uno falsus in omnibus.* (The Trindad, 7 Wheat., 283.)" A. B. T. Co. *vs.* Peoples Tel. Co., 22 F. R., 309.

"The witness who gives false testimony as to one particular, cannot be credited as to any, according to the legal maxim *falsus in uno falsus in omnibus.* And if there be reason to suppose that his perjury or prevarication is the result of subornation, it affords a reasonable ground, in a donbtful case, for suspecting the testimony of other witnesses adduced by the same party." Wellman *vs.* Blood, 1 McA. Pat. Cases, 432.

George E. Hamilton, Esq., swore, in one place, that the plaintiff's counsel said that "he could not consent to the dismissal of the suit," and in another place, that the dismissal "was with the full knowledge and acquiescence and consent of counsel for plaintiff." (Rec. p. 13.) *Allegans contraria non est audiendus.*

He made affidavit also, as facts of his personal knowledge, which he did not know to be true, and therefore ought not to have stated on his personal responsibility when he asserted, in effect, that the *Chief Justice*, after his return from Europe, had dismissed the suit; for the record shows that the suit was dismissed by Hon. H. M. Clabaugh, and the proceeding, by his own statement, was in vacation, and while he himself was absent. Rec., p. 13.*

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*"For a lawyer to come out from the chambers of a judge with an *ex parte* writ that he could not defend before the public, would have occasioned the same sentiment towards him as if he came out with a stolen pocketbook." (William M. Evarts. Esq., at a meeting to organize the New York Bar Association, referring to a time when the courts

"There be," saith our Lord Bacon, in his essay, Of Cunning, "that can pack the cards, and yet cannot play well." The enmeshing of the counsel for the Baltimore & Ohio Railroad Company in the web of his own weaving may be explained in this wise: The person who secured from Justice Clabaugh the entry of the *ex parte* order was, at the time of filing the motion to vacate the order, where he could not be consulted, and John J. Hamilton and George E. Hamilton, mistakingly assuming that, as the motion to vacate the order was made before Chief Justice Bingham, *he* had dismissed the cause, manufactured their affidavits without consulting the minutes of the court.

During June, 1901, plaintiff's counsel, Judge Wilson, assured the witness Stebbins (Record, p. 11), who was urging a speedy trial of the cause, "that the same would be heard in the October term of the Supreme Court of the District of Columbia." The attorney-witness, George E. Hamilton, swears, in effect, that during the same month Judge Wilson gave his consent to the dismissal of the suit. That is incredible. After his return from Europe, Judge Wilson assured the same witness "that the demurrers would be heard as soon as the Schley investigation was concluded." (Record, p. 11.)

John J. Hamilton swears that he made the motion for dismissal on August 6, 1901, before the Chief Justice, and George E. Hamilton swears in effect to the same statement. In whatever way the order was gotten on the minutes, the Record says the proceeding was before Hon. H. M. Clabaugh.

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were pure, prior to the issuing by Judge Barnard of his twenty-one *ex parte* orders.)

When his general, Parmenio, besought Alexander to steal upon the enemy under cover of night, he replied: "Zeus forbid that I should filch a victory in the dark."

> "Absolute nullities in judicial proceedings are such as result from radical defects, omissions and irregularities, appearing on the face of the record, and are not dependent upon matters *en pais* to be established by evidence *aliunde*." Stockhouse *vs.* Zuntz, 36 La. Ann., 533.
>
> "The only plea admissible against a record is *nul tiel record*, and the only way to try the issue thus raised is by an inspection of the record or a certified copy. In other words the record cannot be contradicted on a question of fact, in order to show jurisdiction." 1 Coke's Inst., 260.

Allowing the two affidavits to be true, the inevitable and necessary conclusion would be that the Hon. Jeremiah M. Wilson, whom a leading lawyer of the District Bar has characterized as standing

> "by unanimous consent on the topmost round of reputation, as an experienced, learned, and shrewd lawyer, a wise and honorable counsellor, with whom the interests of his clients were safe and precious as the apple of his eye—a man renowned alike as lawyer, advocate, judge, statesman and man of unswerving uprightness,"

sold out his client and betrayed his trust. Vid. W. L. R., Dec. 19, 1901, p. 860.

> "If devotion to duty be that which entitles any man to respect, if devotion to the interests of his client be that which entitles a lawyer to the respect of his brethren and the esteem of the world, then I should say that Judge Wilson earned the admiration of all men and that upon his tomb should be inscribed, Faithful—faithful unto death." A. S. Worthington, Esq., W. L. R., Dec. 19, 1901, p. 853.

"It is the glory of our profession that its fidelity to its client can be depended upon." Brewer, *J.*, in U. S. *vs.* Costen, 38 F. R., 24.

SINCE there was no motion filed, or indeed written, and no notice to the plaintiff, or his counsel, as required by Rule 88, the court had no jurisdiction to render the particular judgment and it is therefore *void.*

Jurisdiction, or the right or authority a judge has to give judgment, may be defined as the right of a judge to pronounce a sentence of the law on a case or issue before him (United States *vs.* Arredondo, 6 Pet., 709), acquired through due process of law. (2 Coke Ins., 56; Murray *vs.* Hob Land Co., 18 How. 276.)

The plaintiff was not voluntarily absent at the hearing of the motion, assuming that there was a hearing, for neither was he nor was his counsel notified, and therefore he was not in *voluntary* default. The failure to recognize any difference between the case of a voluntary default, after personal service, or voluntary appearance, on the one hand, and the case of an involuntary default, without personal service or voluntary appearance, on the other hand, has led to much injustice. The difference is fundamental, and goes to the very root of the constitutional question. The most essential elements of "due process of law" are notice to the defendant, and an opportunity to be heard in defense. A judgment after voluntary default possesses both of these elements : a judgment after involuntary default possesses neither of them. A judgment after involuntary default secures neither of these constitutional rights.* (Harris *vs.* Hardeman, 14 How., 334.)

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*The requirement of notice applies not only to the original process, but also to *mesne* process, *i. e.*, or notice, when made necessary by the rules of court or by law.

> Due process of law: "Requires an orderly proceeding, adapted to the nature of the case, in which the citizen has an opportunity to be heard, and to defend, enforce and protect his rights. A hearing or an opportunity to be heard is absolutely essential. We cannot conceive of due process of law without this." Stuart *vs.* Palmer, 75 N. Y., 183.

Justice Field, in Windsor *vs.* McVeigh, 93 U. S., 277, said:

> "A sentence of a court pronounced against a party without hearing him or giving him an opportunity to be heard is not a judicial determination of his rights, and is not entitled to respect in any other tribunal.
>
> "That there must be notice to a party of some kind, actual or constructive, to a valid judgment affecting his rights, is admitted. Until notice is given, the court has no jurisdiction in any case to proceed to judgment, whatever the subject matter. But notice is only for the purpose of affording the party an opportunity of being heard upon the claim or charge made; it is a summons to him to appear and speak if he has anything to say, why the judgment sought should not be rendered. A denial to a party of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether." "For jurisdiction is the right *to hear and determine*, and not to determine without hearing."

Again in New Orlears Water Works *vs.* N. O., 164 U. S., 480, the court said:

> "For, in the absence of the parties interested and

without their having an opportunity to be heard, the Court would be without jurisdiction to make an adjudication affecting them. Such a decree woud appear, upon the very face of the record, not to be due process of law, and could be treated everywhere as a nullity."

Neal *vs.* Wellons, 12 Smeades & M. 649:

"A decree of any court affecting and determining the rights of parties, without notice to those parties, or without the notice required by law in such cases, in null and *void* as to them."

In King *vs.* the Chancellor of Cambridge University, 1 Strange, 557, it is stated:

"Besides, the objection for want of notice can never be got over. The laws of God and man both give the party an opportunity to make his defense, if he has any. I remember to have heard it observed by a very learned man upon such an occasion, that even God himself did not pass sentence upon Adam, before he was called upon to make his defense. Adam (says God,) where art thou? Hast thou not eaten of the tree, whereof I commanded thee that thou shouldst not eat? And the same question was put to Eve also."

Without notice there can be no "due process of law." (Cooley, Constitutional Limitations, 356; Hogan *vs.* R. D., 111 U. S., 701, 707; *ex parte* Wall, 107 U. S., 265. See also 2 L. R. A., 657).

Cushing, in his work on Roman law, speaks of the right of notice as one of the "precepts of natural right" which are necessarily presupposed by every code, and by every act of legislation. He refers to the case of Scott *vs.* Dickinson, 14 Pick, 276, in which Chief Justice Shaw held that "where

it is intended by the legislature * * * that bodies appointed to pass judgment upon the rights of others, shall have power to proceed *ex parte*, such an intent should be manifested *in express terms*, or by *necessary implication.*" See also Chase *vs.* Hathaway, 14 Mass., 22.

The requirement of notice is common to all judicial systems. As Cicero said of Maritime law: "*Non erit alia lex Romae, alia Athenis, alia nunc, alia posthac, sed et apud omnes gentes, et omni tempore una eademque lex obtinebit.*"

Clause 6 of the first of the Ten Tables, *De in Jus Vocando*, reads: "If the affair is not settled on the way, then let the praetor, in the comitium or forum, before noon, *both parties being present*, take cognizance of the cause, and hear them fully."

Athenian Judges, in civil cases, took a solemn oath and swore, among other things: "I will hear *both the plaintiff and the defendant* without partiality. If I violate this oath, or any part of it, may I perish with my whole family."

When a plaintiff summoned his adversary to appear he was required to take with him sufficient witnesses to attest the giving of the summons. (See *Ulpianus in Midianam.*)

Notice is necessary on motion, to render a judgment valid. (22 Ala., 61; 16 Ky., 11; 11 Tenn., 355; 15 Tenn., 365; 22 Tenn., 313; 20 Tenn., 335; 34 Tenn., 177; 39 Tenn., 598.)

> "In the summary *ex parte* proceeding by motion, where the defendant has no day in court, any presumption of a waiver of errors by him is not to be made. The *onus* is on the plaintiff to make out his case in every material point, and if the proceeding be defective in matter material, it is not merely voidable, but *void.* The *ex parte* proceeding being without notice, is at the peril of him who instituted it."
>
> "For a judgment by motion must be perfect in

itself and *cannot be aided by extrinsic proof;* as that would be, in effect, to try the case *de novo*, after it had been finally adjudged. *It must be tested by the facts, which appear on its face.*" (Cannon *vs.* Wood, 34 Tenn., 177.)

"It is certainly true that, in all summary proceedings by motion, the judgment, whether by default or otherwise, must show *affirmatively*, every fact necessary to give the court this summary jurisdiction. It is also true, that, in cases in which the statute requires a certain notice to be given, the record must show *that notice was* given for the time, and in the manner required." (Arthur *vs.* The State, 22 Ala., 64. See also, 39 Tenn., 598; 20 Tenn., 335; 22 Tenn., 313.)

"Every fact necessary to give the court jurisdiction in a summary proceeding, *must appear of record* to give the judgment validity; if they do not appear, the judgment is *coram non judice* and void." (Hamilton *vs.* Burum, 11 Tenn., 355.)

"Judgments by motion, and other summary proceedings without notice are *in derogation of the common law;* and to be valid they must be in strict accordance with the provisions of the law by which they are authorized." (Garner *vs.* Carroll, 15 Tenn., 365.)

And is it not the corner stone—the bed-rock foundation of the temple of Justice, "*Audi alteram partem.*" See Broom's Legal Maxims, pages 113-115 and cases cited.

All jurisdiction, it is believed, is resolvable into three heads: (1) Jurisdiction over the person; (2) Jurisdiction over the subject-matter; (3) Power to render the particular judgment which was rendered. But both the two former may exist, and yet the last may be wanting.

> "Although a court may have jurisdiction over the parties and the subject-matter, yet if it make a decree which is not within the powers granted to it by the law of its organization, its decree is void." U. S. *vs.* Walker, 109 U. S., 278.

Jurisdicition is: "The power to hear and determine and give the judgment rendered." *Ex parte* Reed, 100 U. S. 23.

> "The doctrine that a judgment in a case of which the court has once acquired jurisdiction cannot be collaterally assailed is only correct when the court proceeds, after acquiring jurisdiction, *according to established modes governing the class to which the case belongs*, and does not transcend, in the extent or character of its judgment, the law which is applicable to it." Windsor *vs.* McVeigh, 93 U. S. 274.

Again in Tenney *vs.* Taylor, 1 App. D. C. 227, it is stated that:

> "Even where there is jurisdiction of the person and the subject-matter, *if the court does not proceed according to established modes*, or transcends the power granted to it by law, that fact may be shown in a collateral proceeding, and if shown, *the judgment will be regarded as void.*"

Had the court *power*, during vacation or recess on August 6, 1901, to enter upon the inquiry, in the absence of the plaintiff of record or his attorney, and in the absence of any motion in writing as required by Rule 88, Common Law Rules, and when no notice, either actual or constructive, of the motion, or time or place of hearing, or the nature of the motion, had been given the plaintiff or his attorney? It had not the *legal* jurisdictional power so to do. It did, how-

ever, exercise the *physical* power and arbitrarily dismissed the cause.

The judgment was clearly *void* and could be attacked directly or collaterally at any time during or *after the term*, for "time does not confirm a void act."

II.

CONCERNING THE MOTION TO VACATE THE EX PARTE ORDER HEARD JUNE 24, 1902.

On May 19, 1902, motion was filed to set aside the *ex parte* order of August 6, 1901, and it was heard by Chief Justice Bingham on June 24, 1902. The court had jurisdiction *after the term*, first, because the *ex parte* order was made without jurisdiction and was void; and second, because the summary motion was a substitute for the writ of error *coram vobis*, or *coram nobis*, to correct error of fact.

Some of the references in the Reports as to the use of these writs and the summary motion are as follows:

> "It is believed to be the settled modern practice, that in all instances ,in which irregularities could formerly be corrected upon a writ of error *coram vobis*, or *audita querela:* the same objects may be effected by motion to the court, as a mode more simple, more expeditious, and less fruitful of difficulty and expense." Harris *vs.* Hardeman, 14, How., 346.
>
> "It cannot be questioned that the appropriate use of the writ of error *coram vobis*, is to enable a court to correct its own errors; those errors which precede the rendition of judgment. In practice the same end is now generally attained by motion." Picketts Heirs *vs.* Legerwood, 7 Pet., 147.

The cases for error *coram vobis* are: "Error in the process, or through default of the clerk, etc." 148.

> "But all the books concur in quoting the language of Rolle's Abridgment, p. 749, that if the error be in the judgment itself, and not in the process, a writ of error does not lie in the same court." 148.

> "No principle is better settled, or of more universal application, than that no court can reverse or annul its own final decrees or judgments, for error of fact or law, after the term in which they have been rendered, unless for clerical mistakes," etc. "Bills of review, in cases in equity, and writs of error, *coram vobis*, at law, are exceptions which cannot affect the present motion." Siebald *vs.* U. S., 12 Pet., 492.

> "The writ of error *coram vobis* brought before the court of original jurisdiction certain mistakes of fact not put in issue or passed upon, such as that a party died before judgment, or was a married woman, or was an infant and no guardian appeared or was appointed, or that there was error in the process through the default of the clerk." Bronson *vs.* Schulten, 104 U. S. 410.

> "The writ was allowed to bring before the same court in which the error was committed some matter of fact which had escaped attention, and which was material in the proceeding." 416.

In Phillips *vs.* Negley 117 U. S., at page 678, after referring to the exceptions to judgments not being disturbed after the term, it was said that, "on motion" judgment may be "reversed by proceedings for error of fact in analogy to the practice in cases of writ of error *coram vobis*".

In Hickman *vs.* Fort Scott, 141 U. S. 415, Justice Harlan

said in reference to the control of final judgments after the term: "Exceptions to the general rule, such as suits in equity and writs of error *coram nobis* at law, do not embrace the present application."

In D. C. *vs.* Humphries, 12 App. D. C. 128, 131, it is stated that errors of fact not apparent on the record may be corrected by motion as a substitute for a writ of error *coram nobis*. Further, that any fact which has not been litigated and which affects the validity of the judgment, or error in the process, may be inquired into under the writ.

In Queen *vs.* O'Connell, 7 Ir. L. 261, writ of error *coram nobis* was allowed. Errors of fact were: Grand Jury returned true bill upon the evidence of witnesses not sworn in the Court of Queens Bench as required by the 56th Geo. 3, c. 87. The Attorney General pleaded *in nullo est erratum* and judgments were affirmed."

The Traversers brought writs of error in Parliament and while the House of Lords did not reverse the judgments on the assignment of error *coram nobis*, but on other grounds, no doubt was expressed as to the right to sue out the writ. See 11 Cl. & F. 252. The procedure was obviously regarded as correct.

State of Kansas *vs.* Calhoun, 50 Kans., 523; (21 W. L. R., 423). In March, 1892, in the District Court of Marion county, R. Calhoun, after seven years imprisonment, brought proceedings in the nature of those known to the common law as writs of error *coram nobis* to revoke sentences previously imposed, on the ground that he had been deprived of his constitutional rights. The court vacated sentence and directed further proceedings. The Supreme Court, on writ of error, affirmed the judgment.

> "A writ of error *coram nobis* is a proper remedy to enable a party against whom a judgment has been taken on motion and without notice, to be relieved

> in the same court, by showing error of fact." Wynne *vs.* Governor, 1 Yerg. 150.

A court has power to reinstate a cause after the term when dismissed by mistake. The Palmyra, 12 Wheat. 10; quoted in Siebald *vs.* U. S., 12 Pet. 492, and in Phillips *vs.* Negley, 117 U. S., 674. In *ex parte* Crenshaw 15, Pet. 119, the court took jurisdiction after the term.

> "If a judgment be obtained in a Superior Court clandestinely, by abuse of its forms, and by deceiving its officers, the defendant against whom it is sought to enforce such judgment, may obtain a speedy remedy by applying to have it set aside, and the offender punished by attachment." Brown's Legal Maxims, 232, 4th. Ed.

In case of fraud the Supreme Court will reverse its decision after the expiration of the term. U. S., *vs.* Gomez, 23 How. 326; 1 Wall. 690, 702.

Error of fact was brought before Chief Justice Bingham on June 24, 1902, and which affected the validity and regularity of the proceeding itself in dismissing the cause on August 6, 1901. This fact was: error in respect to the process—the entire absence of the motion in writing or notice in any form as required by Rule 88, Common Law Rules. This error preceded the rendition of the judgment; it was a matter of fact which had escaped the attention of the court and was material in the proceeding: neither the plaintiff nor his counsel being present. The existence of the motion in writing and the notice, (there being no stipulation or retraxit in writing filed), were absolute prerequisites for entering upon the inquiry. In their absence the court did not have legal power to "hear and determine" much less to determine without hearing. The proceeding of dismissal involved *legal fraud*, was irregular, and worked a surprise.

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The Chief Justice overruled the motion, as far as the Record discloses, in view of the two false affidavits of the defendants counsel and his clerk, filed in the "agonies" of the cause. His decision on the facts was error of law, determined the cause, was final, and appealable.*

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*"*Mandatis cavetur, ut praecides attendant, ne patroni in causa, cui patrocinium praestiterunt testimonium dicunt.*" (Digestorum Lib. XXII, Tit. V. 25 de Testibus.)

"Upon the same foundation of a suspicion of falsehood, the evidence of the advocate or procureur of either of the parties ought not to be admitted. Their testimony would be liable to the suspicion of partiality, if they were witnesses in favor of their parties, and there would be an indecency in admitting them as witnesses against them." (Evans' Pothier, P. 4, c. 2, Art. 8.)

"XXXV. I will never be voluntarily called as a witness, in any cause in which I am counsel. Should my testimony, however, be so material that without it my client's cause may be greatly prejudiced he must at once use his option to cancel the tie between us in the cause, and dispense with my further services, or with my evidence. Such a dilemma would be anxiously avoided by every delicate mind, the union of counsel and witness being usually resorted to only as a forlorn hope, in the agonies of a cause, and becomes particularly offensive, when its object be to prove an *admission* made to such counsel by the opposite litigant. Nor will I ever recognize any distinction in this respect between my knowledge of facts acquired before, and since the institution of the suit; for, in no case will I consent to sustain by my testimony any of the matters which my interest and

The act of Congress, approved February 9, 1893, establishing the Court of Appeals, District of Columbia, provides:

> "Sec. 7. That any party aggrieved by any final order, judgment, or decree of the Supreme Court of the District of Columbia, or of any justice thereof, may appeal therefrom to the Court of Appeals hereby created; and upon such appeal the Court of Appeals shall review such order." See also Code Sec. 226.
>
> "In cases where applications are made to vacate judgments for any of the specific causes mentioned in the Maryland Act of 1787 Ch. 9, Sec. 6, it has been uniformly held that, upon the refusal of such application, an appeal will lie by the defendant,

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professional duty render me anxious to support." (Resolutions in regard to Professional Deportment. Hoffman's Course of Legal Study, P. 766.)

"192. *Witness in his own cause.* It is an unwritten law of the legal profession that an attorney may not be a witness in the cause he is conducting. The rule is scrupulously observed by every self-respecting lawyer, and yet it seems to rest wholly on ethical grounds. It is not contrary to any statute, nor ever to any maxim of the common law, for an attorney to take the stand for his client, and while courts may endeavor to discountenance the practice they are powerless to prevent it. (Morgan *vs.* Reberts, 38 Ill. 65.) It would seem that in England it has been held a person may not appear in the double capacity of witness and advocate, but in this country the courts have done no more than to condemn the practice as indecent and in violation of professional propriety. (Frear *vs.* Drinker, 8 Pa. St. 521.)" G. W. Warvelle LL. D. in Legal Ethics.

because the judgment in such case is final and conclusive." Spalding *vs.* Crawford, 3 App. D. C. 366.

"An order of the Circuit Court in Chancery refusing to set aside a decree for irregularity, is a final order from which an appeal may be taken to the Supreme Court.

"The right of appeal, in such a case, is a statutory right; and the Supreme Court cannot dismiss the appeal on motion, on the ground that the granting of the application made by the court below was discretionary." Mich. Ins. Co. *vs.* Whittemore, 12 Mich. 311.

In the Supreme Court of the District of Columbia, in December, 1896, a judgment was entered on a verdict against the District of Columbia. Proceedings in error were taken but were dismissed by the Court of Appeals on failure to have bill of exceptions prepared in time.

At a *succeeding term* of the Supreme Court defendant filed a motion to vacate the judgment on the ground that there was no valid verdict, which motion was overruled.

On appeal to the Court of Appeals motion to dismiss was denied, and the decision reversed and the case remanded, with instructions to vacate the judgment, to set aside the verdict and award a new trial (12 App. D. C. 122). The ruling was based upon the ground that the verdict was an absolute nullity, and therefore the judgment resting upon it void, and one which could be set aside *at any subsequent term.* This view of that principal in that case is on all fours with what we claim in this case.

The question came before the Supreme Court of the United States on error to the Court of Appeals (Humphries *vs.* D. C. 174 U. S. 190). The court decided that the defect complained of was merely matter of error and did not render the verdict a nullity.

But the procedure of appeal to the Court of Appeals from the order overruling the motion to vacate the judgment of a preceding term was *not criticised*, and so would appear to have been approved.

Judgment of a subordinate court on a writ of error *coram nobis* is reviewable. Woods Executors *vs.* Colwell, 34 Penn. St., 92; Halford *vs.* Alexander, 12 Ala., 180.

> "It is true that an appeal will not lie from an order of the court striking out a judgment, when the motion is made during the term at which the judgment was rendered, because, during the term, the judgment is under the control of the court, and if set aside, the rights of neither party are determined, and the case stands for trial immediately, and the plaintiff may proceed with the trial at the same term. But the case is very different where the motion to strike out the judgment is overruled by the court, for then the liability of the defendant is fixed and determined, and his right to appeal accrues, without which he would be entirely remediless. *From orders overruling motions to strike out judgments, we are clearly of the opinion that appeals lie, whether the motions be made during the same term, or at a term subsequent to that at which the judgment was rendered.*" Hall *vs.* Holmes, 30 Md., 530.

Merrick *vs.* The Baltimore & Ohio Railroad Company, 33 Md., 487.

In this decision, Alvey, *J.* (now Alvey, *C. J.*), giving the present adverse ruling, said at page 486:

> "The question is, whether from the nature of the motion, matters of law were required to be determined in finally disposing of it, and not whether it was disposed of upon one ground rather than another. The legal result was the matter to be re-

> viewed by the Supreme Bench, and not the particular reason upon which the City Court acted in overruling the motion. The motion was finally overruled and the party making it put out of court without relief, and its only remedy was an appeal, to which we think it was clearly entitled." See Poe's Practice, Sec. 391 *et seq.*, 3d Ed., 1897.

What was law for the Baltimore & Ohio Railroad Company (one of the defendants in error here), when in voluntary default, should be law for the present plaintiff in error, when in involuntary default.

It will be observed that on writ of error *coram nobis* in Queen *vs.* O'Connell (*supra*) judgment was affirmed; and that on writ of error *coram nobis* in State of Kansas *vs.* Calhoun judgment was revoked or set aside. The House of Lords in the one case, and the Kansas Supreme Court in the other, entertained writs of error. In the latter case, Valentine, *J.*, said:

> "Before proceeding to the discussion of the questions presented by the counsel as being involved in this case, it would be well to state that it is admitted by counsel that the proceedings in the lower court were civil in their nature, and not criminal, and that the remedy of petition in error, and not appeal, is the proper remedy in this court."

III.

PROCEEDINGS BEFORE THE COURT OF APPEALS.

On appeal to the Court of Appeals, the defendants moved to dismiss on the ground that the order of Chief Justice Bingham overruling plaintiff's motion was not appealable;

whereupon the Court of Appeals, excluding oral argument, entered upon the consideration of the merits and dismissed the appeal. Its order determined the cause and was final.

(1) The court erred in dismissing the appeal on motion and on the merits without oral argument.

The merits should not have been considered on motion to dismiss. The court should only have inquired whether an appeal lies, and whether it was properly taken and prefected. If the merits were to be considered, or to be at all considered, the motion should have been heard along with the appeal, and the merits not passed upon, as they were, without oral argument.

The merits of the controversy on appeal cannot be decided upon the motion to dismiss. Hill *vs.* Chicago, etc. Co., 129 U. S. 170.

In Hooper *vs.* Beecher, 109 N. Y. 609, the court said:

> "The judgment is final and therefore appealable. The legal questions involved depend upon the consideration of the pleadings and proofs. These questions should be discussed in the argument when reached in regular order."
>
> See also State *vs.* Bradley, 29 Mo., App. 366; Dzialyuski *vs.* Bank, 23 Fla. 44; Burke *vs.* Pepper, 29 Neb. 320; State *vs.* Prater, 26, S. C. 613.
>
> "On a motion to dismiss (a writ of error) the court will look at the regularity of the writ and the fact of jurisdiction. Other questions must in general await final hearing." Sparrow *vs.* Strong, 3 Wall 105; N. O. R. R. *vs.* Morgan, 10 Wall, 256.

Plaintiff's suit was dismissed by Justice Clabaugh without giving him any hearing at all. At the hearing, on motion before Chief Justice Bingham, his cause was very superficially presented, and the decision was based upon false affidav-

its not duly analyzed and considered. The Court of Appeals entered upon the merits without giving any hearing upon them at all. And the attempt is now being made here to prevent a proper consideration of the merits.

> "But limiting the time of an argument and refusing to permit any argument at all, are entirely different matters. The one is the exercise of a discretion. The other is the denial of a right." (Brewer, *J.*, in Douglass *vs.* Hill, 29 Ks., 529, and cases cited.)
>
> "Every person has a legal as well as a natural right to be heard in his own cause by himself or attorney." Sodousky *vs.* McGee, 4 J. J. Marshall, 271.
>
> "No man alone with all his utmost labors, nor all the actors in them, themselves by themselves out of a court of justice, can attain unto a right decision; nor in court without solemn argument where I am persuaded Almighty God openeth and enlargeth the understanding of those desirous of Justice and Right. For it is one of the great honors of the common laws that cases of great difficulty are never adjudged or resolved *in tenebris* or *sub silentio supressis rationibus*, but in open court, and there upon solemn and elaborate arguments." Lord Coke.
>
> "I distrust the soundness of the decision of any court, or any case either novel or complex, which has been submitted *wholly* upon briefs." Hon. J. F. Dillon, Am. L. Rev., Vol. 19, page 20.

(2) The court erred in holding that there was not, in law, any fraud or surprise in procuring the judgment of dismissal on August 6, 1901.

The absence from the record of the motion and notice in writing required by Rule 88, Common Law Rules; the absence of any stipulation in writing and any *retraxit*; and

there being no appearance of the plaintiff or his counsel, and no hearing, made the entire proceeding without notice, fraudulent. (See Record.)

(3) **The court erred in holding the affidavits of the defendants' counsel and his clerk competent evidence in law to prove that the motion to dismiss was made after full notice to the attorney for the plaintiff that such motion would be made and not resisted.**

The record cannot be contradicted on a question of fact, such as that of actual notice, in order to show jurisdiction. 1 Coke's Ins., 260. Moreover, the defendants' affidavits were false, and contradictory—if indeed they did not prove that Judge Wilson had never received legal notice of any motion—not even oral notice of intention to move for dismissal. The Trindad, 7 Wheat., 283; Wellman *vs.* Blood, 1 McA. Pat. Cas., 432.

To fabricate evidence for the purpose of aiding his case raises, rightfully, a strong presumption against the justice of the party's claim. (Winchell *vs.* Edwards, 57 Ill., 41.)

In the State trial of Annesley *vs.* The Earl of Anglesea (17 How. St. Tr. 1430) it was shown that the defendant had caused the plaintiff, who claimed the title and family estate, as heir, to be kidnapped and sent to sea, and that he afterwards endeavored to have him convicted on a false charge of murder. The court left it to the jury whether "the presumption arising from the kidnapping, and the prosecution for murder, do not speak stronger than a thousand witnesses," and they found in favor of the plaintiff.

In a case in the Federal courts (The Tillie, 7 Ben. 383) an action was brought to recover of a steamboat the damages received by a canal boat in a collision. The steamboat set up as a defense the extreme darkness of the night, and her master produced a logbook, purporting to have been kept by him, which showed this. In rebuttal, evidence was in-

troduced to show that the logbook was false, and had been written up for the purpose of the case. The court, after finding this to be the fact, said: "This conclusion disposes of the case; for in a conflict of evidence such as the case presents, the production of a fabricated log warrants the rejection of the testimony which it is brought to support. If possible, it ought never to happen that a case sought to be supported by a fabricated logbook should succeed."

In Moriarity *vs.* London R. Company (L. R. 2 Q. B. 314) where false evidence was introduced, Cockburn, C. J., said: "The conduct of a party to a cause may be of the highest importance in determining whether the cause of action in which he is plaintiff, or the ground of defense, if he is defendant, is honest and just; just as it is evidence against a prisoner that he has said one thing at one time and another at another, as showing that the recourse to falsehood leads fairly to an inference of guilt. So if you can show that a plaintiff (or defendant) has been suborning false testimony, and has endeavored to have recourse to perjury, it is strong evidence, that he knew perfectly well his cause was an unrighteous one."

(4) The court erred in holding that the Supreme Court of the District of Columbia had no control of the judgment, *after the term*, in which it was rendered.

Void judgments can be attacked directly or collaterally at any time. Summary motion, as an equivalent for the writ of error *coram vobis* or *nobis*, can call before a court after the term, and for correction, any error of fact which affects the judgment. (Cases cited in body of brief.)

(5) The court erred in holding that the refusal of the Supreme Court of the District of Columbia to vacate the order of dismissal is not the subject of appeal.

The order overruling the motion on July 24, 1902, was

final and appealable under Section 226 of the Code of the District of Columbia. Appeal was a "statutory right." Mich. Ins. Co. *vs.* Whittemore, 12 Mich. 311; D. C. *vs.* Humphries, 12 App. D. C. 122; Hall *vs.* Holmes 30 Md. 530; Spaulding *vs.* Crawford, 3 App. D. C. 366; and other cases cited in the brief including Queen *vs.* O'Connell, and State of Kansas *vs.* Calhoun.

(6) The court erred in holding that the motion to vacate the order of dismissal was a motion for a "new trial."

The proceeding on August 6, 1901, before Justice Clabaugh was no trial at all. And as there had been no trial either before a referee or a jury or a judge there could be no "new trial." A motion for a new trial in a civil case is an application for a re-examination of an *issue of fact* before a court or jury, which had been tried *once* before the same court. Hilliard on New Trials, Section 1. Moreover, a motion for new trial is a direct and not a collateral motion. Finally, the application for a new trial is always addressed to the judge who tried the cause.

(7) The court erred in apparently holding that appeal could be taken, in the present instance, only from the judgment dismissing the case, and not from the order of the court overruling the motion to vacate the order of dismissal.

(See the review of the decisions cited by the defendants in support of the motion to dismiss, pp. 8–11 *et seq.*)

(8) The court erred in holding, as a matter of law and *on the evidence before it*, that "it was certainly incumbent upon the plaintiff to move in the cause, and

to have the demurrers disposed of, and the case brought to trial."

In Meloy *vs.* Keenan 17 App. D. C., 237, the Court of Appeals said.

> "There is no statute, or rule of court having the force of a statute, requiring a cause to be brought to a trial within a given period, under penalty of forfeiture of the right of further prosecution."

The position taken by this court upon the same point in the two cases are clearly antagonistic.

The only evidence before the court in the present case was mere period or lapse of time. "A judge who decides on half evidence," says an old English proverb, "is apt to do quarter justice."

Due or reasonable diligence, where alleged to be lacking, is a question of fact to be shown to the court by proper proof. It is not known what showing the defendants made on August 6, 1901, if any, for they filed no affidavits. Moreover the plaintiff had the right, which was denied him, to submit defore Justice Clabaugh, on August 6, 1901, proof showing why he had not more vigorously speeded his cause.

However, the plaintiff states in his affidavit "that he was assured from time to time by said Wilson that the demurrers interposed to the declaration would be heard in the fall of 1901."

> "That the suit was commenced by this deponent in good faith and that he had at all times since the commencement of said suit intended, in good faith, to prosecute the same as vigorously as possible." (R. p. 10.)

And the witness Stebbins says: "That during said month (June, 1901) this deponent had a conversation with said Wil-

son with reference to procuring an early trial of the said cause, and upon that occasion was assured by said Wilson that the cause had been continued by mutual agreement of counsel and that the same would be heard in the October term of the Supreme Court of the District of Columbia." (R. p. 11.) Again: "And deponent further says that shortly after the return of the said Wilson he had a conversation with him with reference to having the demurrers filed in said cause disposed of and the case placed upon the trial calendar as early as possible, and that in said conversation he was assured by said Wilson that the demurrers would be heard as soon as the Schley investigation was concluded," etc. (R. p. 11.) So at the very time the defendants were making secret preparations to get plaintiff's suit dismissed behind his back, he is shown to have been *active* in bringing the demurrers to a hearing.

That "the cause had been continued by mutual agreement of counsel" (R. p. 11) there can be no doubt. George E. Hamilton does not deny it, though his clerk does aver that it was not continued "by the mutual agreement of *all* the attorneys interested in said case". (R. p. 15.) In any event Judge Wilson should have had the opportunity, which was denied him, to put the matter of fact as to the agreement, if denied, in issue on August 6, 1901 before Justice Clabaugh.

Furthermore, if there had been no agreement for continuance the defendants themselves could, under the Rules and at any time, have forced the hearing of the demurers.

"Demurrers may be heard, on any motion day, after five days notice, exclusive of Sundays." Rule 38, Common Law Rules.

Plaintiff believes there were ample reasons why the suit was not sooner prosecuted by him after the filing of the demurrers, and he certainly had the right to present his rea-

sons before the court on August 6, 1901, before his cause was arbitrarily dismissed.

On reference to the Declaration (R. p. 4), it will be seen, that when plaintiff commenced his suit against the Wason Manufacturing Company of Massachusetts, on December 13, 1887, he was assailed by a secret trust and combination of railroad companies in the fifteen Atlantic coast states, known as the Eastern Railroad Association,* which was outside the jurisdiction of the court, and which, without legal intervention, interfered in his said suit and embarrassed, and impeded, and oppressed him in his attempts to legally prosecute the same. And that he was likewise assailed by the same combination in attempting to prosecute other suits. He was compelled to defend himself, as best he could, against this overpowering, impersonal might, "acting as a unit" and moving upon him like a glacier or the relentless and remorseless tides of the sea. For the individual citizen to oppose such a monster, with the single eye of a Polyphemus and the more than one hundred arms of a Briareus, was like a single man, untrained in military affairs, taking his musket or shot gun and attacking a drilled army. The necessary inference, without any use of the imagination, is that after more than *seven* years of continuous assaults upon him, he was not in condition, either financially or otherwise, immediately and vigorously to prosecute any suit. To insist upon the contrary, and to hold that the plaintiff should im-

* In New York Indians *vs.* U. S., 170 U. S. 32, it was held that documents emanating from the executive and legislative departments of the government may be *judicially noticed* on appeal, though they were not incorporated in the findings of the court below. If the court may rightfully take judicial notice of the Congressional Record for January 16, 1903, the Constitution and By-Laws of the Eastern Railroad Association will be found at page 901.

mediately have "carried the war into Africa," is to assert that the defendants are justified in "taking advantage of their own wrong". To aid them now in attempting to drive the plaintiff out of court is to assist them in consummating their wrong.

This is no common suit between two private persons of limited means, in which the ordinary rules of "due diligence" are applicable; but a suit by a humble citizen to obtain some redress for great wrongs perpetrated by an illegal trust and combination of several hundred railroad corporations which has unlawfully prevented him from gaining free access to the courts of justice and there trying his suits in an orderly manner and without interference.

In Downes *vs.* Bidwell, 182 U. S. 282, Justice Brown enumerated among certain "natural rights" "the right to personal liberty and individual property; to free access to courts of justice, to due process of law and *to an equal protection of the laws.*"

"Every citizen is entitled to resort to all the courts of the country, and *to invoke the protection which all the laws of all those courts may afford him.*" Home Insurance Company *vs.* Morse, 20 Wallace, 451; Doyle *vs.* Continental Insurance Company, 94 U. S., 538.

The plaintiff is praying no favor, but asserting a right, when he demands the benefit of the law as stated by the Court of Appeals in Meloy *vs.* Keenan (*supra*).

The defendants have suffered no detriment by the prolongation of plaintiff's suit. The time element is nothing to these immortal corporations. The plaintiff only has suffered.

SUMMARY.

The question of the jurisdiction of this court to entertain the writ of error has necessarily involved an inquiry into the proceeding before Justice Clabaugh on August 6, 1901; the proceeding before Chief Justice Bingham on June 24, 1902; and the proceeding before the Court of Appeals.

Much of what has been presented may possibly be regarded as pertaining rather to the merits of the questions brought up by our writ of error than to a defence merely against the motion to dismiss. We cannot but believe, however, that the court will appreciate the fact that this has been because the motion absolutely involved the merits of the appeal, and so was forced upon us. They certainly cannot hide or obscure the proposition that we rightfully appealed from the final judgment of the court of original jurisdiction, refusing to vacate its non-jurisdictional judgment of dismissal.

But it has been shown:

That the order of dismissal entered by Justice H. M. Clabaugh was without jurisdiction and therefore *void;* and that the said order or dismissal was final, involved error of fact, legal fraud, irregularity, and worked a surprise:

That Chief Justice Bingham had power *after the term*, on motion, to vacate the void order: and on summary motion, the equivalent of a writ of error *coram nobis*, to set aside the judgment for error of fact, fraud, irregularity and surprise. Also that his order overruling the motion was final and appealable:

That the Court of Appeals erred in dismissing the appeal on motion and on the merits, and without oral argument, and that its decree was final.

Consequently, under the statutes and Sec. 233 of the District Code, the Supreme Court of the United States can entertain the writ of error.

And it is, therefore, respectfully submitted this Honorable Court should reverse the decision of the Court of Appeals, and of the Supreme Court of the District of Columbia, and remand the cause to the latter court with directions to vacate the judgment of dismissal and reinstate the action for hearing on the demurrers.

Respectfully submitted,

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